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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. **911**

NANTAHALA POWER AND LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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December 13, 1967

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	7
I. Two important questions of federal law which have not been, but should be, settled by this Court are presented	8
A. Congress having granted Nantahala permission under §23(b) of the Federal Power Act to construct and operate hydroelectric developments, may the FPC now require licenses in contravention of such Congressional permission?	8
B. May the Federal Government, in the absence of any navigation servitude or property right of the United States and solely in the exercise of its commerce power, take the property of Nantahala without paying just compensation by requiring acceptance of a license, providing for takeover of Nantahala's projects for less than just compensation, as a condition to permitting their continued maintenance and operation?	14
II. The Court below has decided a Federal question in conflict with an applicable decision of this Court, and in conflict with the decision of another Court of Appeals on the same matter	17
A. Is Petitioner entitled to have the constitutional issue (Point IB) judicially determined before Petitioner is required to decide whether to accept a license containing a waiver of Petitioner's right to just compensation?	17
Conclusion	19

APPENDIX A:

PAGE

Opinion below of Court of Appeals for Fourth Circuit 1a

APPENDIX B:

Section 3(13) of the Federal Power Act, 16 U.S.C. §796, 41 Stat. 1063 as amended 49 Stat. 838 ..... 1b

Section 4(g), 16 U.S.C. §797, 49 Stat. 839 ..... 2b

Section 6, 16 U.S.C. §799, 41 Stat. 1067 as amended 49 Stat. 841 ..... 2b

Section 10(a), 16 U.S.C. §803, 41 Stat. 1068 ..... 3b

Section 14, 16 U.S.C. §807, 41 Stat. 1071 as amended 49 Stat. 844 ..... 3b

Section 15, 16 U.S.C. §808, 41 Stat. 1072 ..... 4b

Section 23(b), 16 U.S.C. §817, 41 Stat. 1075 as amended 49 Stat. 846 ..... 5b

APPENDIX C:

Declaratory Order of Federal Power Commission 1c

Federal Power Commission Denial of Rehearing 15c

CITATIONS

Cases:

F.P.C. v. *Niagara Mohawk Power Corp.*, 347 U. S. 239 (1953) 8

F.P.C. v. *Union Electric Co.*, 381 U. S. 90 (1965) 3, 5, 7, 13, 14, 16

First Iowa Hydro-electric Coop. v. *F.P.C.*, 328 U. S. 152 (1946) 8

Jersey Central Power & Light Co. v. *F.P.C.*, 319 U. S. 61 (1943) 13

Rumford Falls Power Co. v. *F.P.C.*, 355 F. 2d 683 (1st Cir. 1966) 7, 17, 18

U. S. v. *Appalachian Power Co.*, 311 U. S. 377 (1940) 7, 14, 16, 17, 18, 19

PAGE

U. S. v. *Darby*, 312 U. S. 100 (1941) 15

U. S. v. *Kansas City Life Ins. Co.*, 339 U. S. 799 (1950) 16

Miscellaneous:

53 Cong. Rec. Appendix 1303 (1916) 8

56 Cong. Rec. 9282 (1918) 8

58 Cong. Rec. 1939 (1919) 8

First Annual Report of the Federal Power Commission (1921) 10

Hearings on H.R. 5423 before House Interstate & Foreign Commerce Committee, 74th Cong., 1st Sess. (1935) 11–12

Hearings on H.R. 2972 before Subcommittee of House Interstate and Foreign Commerce Committee, 80th Cong., 1st Sess. (1947) 12

S. Doc. No. 469, 62nd Cong., 2nd Sess. (1912) 8

S. Rept. No. 179, 65th Cong., 2nd Sess. (1917) 8

Seventh Annual Report of the Federal Power Commission (1927) 8, 11

Statutes:

Federal Power Act, 16 U.S.C. §§791(a) et seq.:

Section 3(13), 16 U.S.C. §796 ..... 3, 6, 15

Section 4(g), 16 U.S.C. §797 3

Section 6, 16 U.S.C. §799 ..... 4, 16, 17

Section 10(a), 16 U.S.C. §803 ..... 4, 12, 13

Section 14, 16 U.S.C. §807 ..... 4, 14, 15, 18

Section 15, 16 U.S.C. §808 4

Section 23(b) 16 U.S.C. §817 ..... 2, 4, 8, 9, 10, 11, 12, 13

Section 313(b), 16 U.S.C. §8251(b) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Nantahala Power and Light Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on September 14, 1967.

Opinions Below

The opinion of the Court of Appeals below is not yet reported. It is printed in Appendix A hereto, pages 1a-27a. The Declaratory Order of the Federal Power Commission (hereinafter "FPC" or "Commission"), requiring the Petitioner to obtain licenses is reported at 36 F.P.C. 119 (1966) and is filed with this petition as Appendix C hereto, pp. 1c-14c.

Jurisdiction

The judgment of the Court of Appeals was entered on September 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Section 313(b) of the Federal Power Act.*

Questions Presented

Between 1940 and 1949, Petitioner, pursuant to §23(b) of the Federal Power Act** filed Declarations of Intention to construct hydroelectric facilities in non-navigable waters over which Congress has jurisdiction under its authority to regulate interstate commerce. The Federal Power Commission in each instance, exercising its investigatory function under that Section, found that the interests of interstate and foreign commerce would not be affected. Section 23(b) provides that if such finding is made, "permission is hereby granted to construct such dam * * * upon compliance with State laws." This permission provided specific statutory authorization by Congress for the construction of petitioner's developments. The questions presented are:

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* 49 Stat. 860 (1935), 16 U.S.C. §8251(b) (1964).

** 41 Stat. 1075 (1920), as amended, 49 Stat. 846 (1935); 16 U.S.C. §817 (1964). Section 23(b) provides in relevant part that anyone intending to construct a dam in a non-navigable stream over which Congress has jurisdiction shall, "before such construction", file a declaration of intention with the Commission. The Commission must then investigate the proposed construction. If it finds the "interests of interstate or foreign commerce would be affected by such proposed construction" a license must be obtained. However,

> "If the Commission shall not so find, and if no public lands or reservations are affected, *permission is hereby granted* to construct such dam or other project works in such stream upon compliance with State laws." (Emphasis supplied.)

(1) May the Federal Power Commission, without further action by Congress, now revoke the permission granted by Congress in §23(b) and require licenses to be obtained for projects constructed under such permission, on the sole ground that the Commission's earlier findings were made in ignorance of its jurisdiction as later established by the *Taum Sauk* case (*Federal Power Commission* v. *Union Electric Co.*, 381 U. S. 90 (1965))?

(2) When there is no navigational servitude, public lands or other property interest of the United States involved, may the Federal Government, despite the prohibition in the Fifth Amendment against the taking of private property for public use without just compensation, require an owner of a facility to agree to ultimately surrender the facility for less than just compensation as a condition to continuing to use the facility in interstate commerce?

(3) Does the Constitutional question (question (2), *supra*) present an issue which should be adjudicated before Petitioner is required to either (1) discontinue maintenance and operation of its facilities, or (2) accept a license agreeing to future surrender of its facilities for less than just compensation, or must Petitioner wait for the government to take its property before obtaining a judicial determination of its rights to just compensation?

Statutes Involved

The statutory provisions involved are all contained in the Federal Power Act, to wit:

Section 3(13), 41 Stat. 1063, as amended 49 Stat. 838; 16 U.S.C. §796;
Section 4(g), 49 Stat. 839, 16 U.S.C. §797;

Section 6, 41 Stat. 1067 as amended 49 Stat. 841, 16 U.S.C. §799;
Section 10(a), 41 Stat. 1068, 16 U.S.C. §803;
Section 14, 41 Stat. 1071 as amended 49 Stat. 844, 16 U.S.C. §807;
Section 15, 41 Stat. 1072, 16 U.S.C. §808;
Section 23(b), 41 Stat. 1075 as amended 49 Stat. 846, 16 U.S.C. §817;

and the Fifth Amendment to the Constitution of the United States. Statutory provisions are set forth in Appendix B hereto.

Statement

Between 1940 and 1949, Petitioner Nantahala Power and Light Company ("Nantahala") filed with the FPC Declarations of Intention to construct seven hydroelectric developments, with aggregate installed capacity of 102,615 kilowatts, in North Carolina on non-navigable (App. C, p. 2c) tributaries of the Little Tennessee River. As to each development, the Commission, exercising the investigatory function delegated to it by Congress under Section 23(b), found that there would be no effect on interstate or foreign commerce (App. C, pp. 3c-4c). Thereupon, Nantahala proceeded to construct each such project in accordance with the Congressional permission (no different in effect from that provided by special act) granted by Section 23(b) of the Federal Power Act (App. B, pp. 4b-5b). The last such development was completed in 1955 (App. C, p. 3c).

Nantahala constructed its projects in reliance upon and pursuant to the permission of Congress in Section 23(b). In 1940, the same year in which Nantahala obtained permission to construct its Thorpe and Nantahala plants without licenses, it filed a Declaration of Intention to con-

struct the Fontana project, on the Little Tennessee River. The Commission found that this project would affect the interests of interstate commerce, and that therefore a license would be required. Nantahala thereupon decided not to construct the project, and subsequently all the lands and rights were transferred to the Tennessee Valley Authority ("TVA"). It is fairly to be inferred that Nantahala, had it been informed that licenses would be required for the headwater projects involved in this case, would have decided not to build such projects rather than accept the heavy burdens imposed by licenses.

All of Nantahala's generating and transmission facilities are located within the State of North Carolina. Under agreements with TVA, that agency controls and directs the generation at, and the transmission of energy from, all of the Nantahala developments including the amounts and precise routing of the power on the line (App. C, p. 2c). Some of this power may be transmitted outside of North Carolina.

On July 13, 1965, following the decision of this Court in *Federal Power Commission* v. *Union Electric Co.*, 381 U. S. 90 (May 3, 1965) the FPC sent to Petitioner (among others) a letter (Joint Appendix, "JA" 1-2) which for the first time intimated that licenses might be required for these developments. On November 29, 1965, Nantahala filed with the Commission an application for a declaratory order that no licenses were required for these developments (JA 3-25). On July 18, 1966 the Commission issued a declaratory order that licenses were required (App. C, pp. 1c-14c).

Such order accepted the fact that the developments in question are neither located on navigable waters of the United States nor affect downstream navigable capacity

(App. C, p. 2c), and the order is based wholly upon the fact that some of the power produced may enter interstate commerce (App. C, pp. 3c-5c). There was no claim that the earlier Commission findings which had preceded construction were not based on a full and factually correct record, nor was there any claim of a significant change in factual circumstances from those upon which the prior findings were premised.* Nantahala's petition for rehearing (JA 41-47) was filed August 16, 1966 and denied by the FPC by order issued September 6, 1966 (App. C, p. 15c.

Nantahala sought review of such order pursuant to Section 313(b) of the Federal Power Act by petition to the Court of Appeals for the Fourth Circuit on November 4, 1966. In such petition, Nantahala objected to the declaratory order of the Commission on the grounds, *inter alia,* that (1) since the developments were constructed pursuant to the Congressional authorization contained in Section 23(b) of the Act, the Commission was without authority to now require licenses for them in derogation of such Congressional authorization; and (2) the requirement of licenses for these developments, carrying with it the provisions of Section 14 of the Federal Power Act allowing their takeover by the United States at less than fair value, would deprive Petitioner of its property in violation of the Fifth Amendment.

By opinion and order of September 14, 1967, the Court below rejected these contentions and ordered the Commission's order enforced. The Court (1) held that notwithstanding the Congressional permission granted by

* The order states (App. C, pp. 2c, 13c-14c) that it is based upon the facts stated in Nantahala's November 29, 1965 petition, which demonstrates no significant change in factual circumstances.

Section 23(b) to construct, maintain and operate a project upon a Commission finding of no effect on commerce, the Commission can at any time after construction, if it finds an effect on commerce, require a license as a condition to continued operation and maintenance of the project (App. A, p. 10a), and (2) refused to consider the Fifth Amendment contention on the ground that the issue was not yet ripe for decision (App. A, pp. 22a-23a).

Reasons for Granting the Writ

The decision below creates fundamental questions of statutory and constitutional interpretation not previously decided by this Court. It raises serious doubts not only as to the meaning of a major provision of the Federal Power Act, but as to the scope, both substantive and procedural, of Fifth Amendment protection of property rights. It involves a conflict between a decision of this Court,* and the decision of the Fourth Circuit,** as well as a conflict between the Fourth and First Circuit Courts.*** The impact of the decision below, if permitted to stand, will be felt not only by Petitioner and other project owners similarly situated, but also by those who may in the future undertake construction of projects like *Taum Sauk,* where the Commission's licensing jurisdiction rests only upon the movement of electric energy in interstate commerce.

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* *U. S.* v. *Appalachian Power Co.*, 311 U. S. 377 (1940).

** See decision below, App. A.

*** *Rumford Falls Power Co.* v. *F.P.C.*, 355 F. 2d 683 (1st Cir. 1966).

I.

Two important questions of Federal law which have not been, but should be, settled by this Court are presented.

A. Congress having granted Nantahala permission under §23(b) of the Act to construct and operate hydroelectric developments, may the FPC now require licenses in contravention of such Congressional permission?

The legislative history of the Federal Power Act makes clear that one of the principal purposes of the Act as a whole, and Section 23(b) in particular, was to encourage development of water power.* One means of encouraging such development was by providing potential investors with certainty as to their rights.** The decision below defeats this aim.

Its exposition of the rights of a party which lawfully built a project under permission granted by the last sentence of Section 23(b)*** is so at variance with the prior interpretation of the Act by the Commission itself as to create grave doubts as to the state of the law. These

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* *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 251 (1953); *First Iowa Hydro-electric Coop.* v. *F.P.C.*, 328 U. S. 152, 180 (1946).

** See, e.g. S. Rept. No. 179, 65th Cong., 2nd Sess. pp. 1-2 (1917); Final Report of the National Waterways Commission, Sen. Doc. No. 469, 62nd Cong. 2nd Sess., pp. 38-39 (1912); 53 Cong. Rec. Appendix 1303 (1916); 56 Cong. Rec. 9282 (1918); 58 Cong. Rec. 1939 (1919). In 1927, the Chief Counsel for the Commission, in an Opinion to the Executive Secretary of the Commission, noted the purposes of Section 23 were to protect navigation and "to protect applicants by providing a means whereby they can have an authoritative ruling before investment is made." F.P.C. Seventh Annual Report, 149, 155 (1927).

*** Hereinafter referred to as a "permitted project".

doubts create the very uncertainties as to rights of investors which the Act was intended to dispel. Further, under the decision below, the owner's rights to obtain any benefit from the project are rendered defeasible by events beyond his control, thereby destroying the reasonable certainty of rights necessary for investment.

In the opinion of the Court below, the obtaining of a finding that there is no effect on interstate commerce protects the owner of a project for that day only, for according to the opinion below whenever

> "the Commission determines that a change in the underlying facts, or a correct exposition of the applicable law, discloses that the facility does affect commerce, continued maintenance and operation is conditioned upon the procurement of a license." (App. A, p. 10a.)

Nothing in the Court's opinion precludes a determination of the "correct exposition of the applicable law" from being made the day after the project's completion or even during construction. Since effect on interstate commerce is a mixed question of law and fact which is not susceptible of determination by the application of fixed objective standards, even a change in the composition of the Commission could lead to a decision which at a minimum could reduce the value of the project if a license were required and at a maximum, if a license were denied, could completely destroy its value. Under these conditions, funding of such projects would become difficult if not impossible.

The lower Court's holding, that §23(b) provides only temporary protection for the investor until such time as the Commission decides a license is necessary, runs directly counter to the certainty that the Act as a whole was intended to create, and is inconsistent with the established

historic interpretation of that section by the Commission and its representatives.

The last sentence of Section 23(b), providing Congressional permission to construct without a license, was taken unaltered from the prior Act. This statutory provision has remained unchanged for more than 46 years; and it was not until 45 years after its enactment that the Commission in this proceeding first claimed that it could revoke such Congressional permission. Heretofore the Commission has expressed an understanding of the statutory language entirely consistent with petitioner's position in this proceeding and contrary to the interpretation given by the Court below.

In the First Annual Report of the Federal Power Commission, published in 1921, the Commission stated:

> "If the Commission finds that the interests of interstate or foreign commerce are not affected, the act grants authority to proceed in compliance with State law, *and the declarant is freed from any subsequent liability to the United States under any existing or future acts of Congress regardless of conditions that may thereafter arise* • • •. It is only when a declaration [of intention] is filed and a decision rendered in the manner prescribed in the act that the finding of the Commission becomes conclusive and binding both upon the declarant and upon the United States" (p. 54). (Emphasis supplied.)

In 1921, under the Federal Water Power Act of 1920, the filing of a Declaration of Intention was optional. The Commission contrasted the certainty inherent in a Commission finding of no effect upon interstate commerce, after filing of a Declaration of Intention, with the risks involved in failing to file a Declaration of Intention. It

observed that a development constructed without a Commission finding of no effect could be subject to severe penalties if "through change of conditions a commerce should develop in the future of which there is no apparent possibility at the time construction is made" (p. 53).

In 1927, the Chief Counsel for the Commission, in an Opinion to the Executive Secretary of the Commission, stated:

> "The paragraph [Section 23] above quoted has two purposes in view: (1) To protect the interests of navigation * * * (2) to protect applicants by providing a means whereby they can have *an authoritative ruling before investment is made.*" F.P.C. Seventh Annual Report, 149, 155 (1927) (Emphasis supplied.)

In 1935, the Federal Water Power Act was made Part I of the Federal Power Act. Section 23 of the original act became part of Section 23(b) of the Federal Power Act. The filing of Declarations of Intention was made mandatory. Otherwise there was essentially no change in the provisions of Section 23. Mr. Dozier DeVane, the Solicitor of the Commission speaking for the Commission, stated in Congressional hearings on the amendments with respect to Section 23:

> "The effect of section 23 is to permit a proper determination in advance of the construction of the project as to whether or not it will affect interstate and foreign commerce. That determination having been made, a license is required or it is not required under the act according to the facts that are shown. If it is a fact that interstate or foreign commerce will not be affected the construction work can be done, without a license. If the facts show that interstate or foreign commerce will be affected

> the construction work cannot be done without a license." Hearings before House Interstate & Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess. at 472 (1935).

In 1947 the Commission's General Counsel, appearing for the Commission, testified before a Congressional Subcommittee that

> "The Commission cannot reserve jurisdiction under the Federal Power Act. If they find the proposed development does not affect interstate commerce, it cannot reserve jurisdiction." Hearings on H.R. 2972 before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 443 (1947).

The foregoing statements of the Commission and its counsel show that Congress intended, and the Commission understood, that certainty as to the future status of a proposed development was a primary consideration in the enactment of the last two sentences of Section 23(b) and its predecessor, Section 23.

The opinion below for the first time casts uncertainty on the rights of the owner of permitted projects. It is petitioner's belief that in the future no investor will undergo the risk of complete loss of value* imposed by such decision, if such opinion is held to be a correct exposition of the law.

Not only does the decision below render a project builder's rights completely defeasible by a mere change of policy on the part of the Commission but, in addition,

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* The question is not merely one of whether a license must be obtained. If the decision below is correct, nothing precludes the Commission from finding that a permitted project fails to meet the requirements of Section 10(a) of the Act, and therefore cannot be licensed or from ordering a license under conditions so onerous as to destroy the value of the project.

under the *Taum Sauk* doctrine, events unrelated to Commission policy and completely beyond the control of a project owner could render his project subject to the licensing requirements of the Act, and could jeopardize a huge investment.

If, for example, a project feeds power solely to an intra-state utility with no interstate interconnections, and there is no effect on navigability, the requisite Commission finding could presumably be obtained, and the project built without a license under the permission granted by Section 23(b). Thereafter, if the purchasing utility (not necessarily under the project owner's control) made interstate interconnection, under the doctrine of the Court below the project owner could no longer maintain the project (although its operation would not change in any way) unless the Commission could find that a license was appropriate under Section 10(a) of the Act (*Jersey Central Power & Light Co.* v. *F.P.C.*, 319 U. S. 61, (1943)).

It is submitted that Congress would never have been so unrealistic as to suppose that money would be invested, and resources developed, under these conditions. Indeed, the decision below renders the Declaration of Intention provisions of Section 23(b) virtually meaningless.

Certainly, the grave questions created by the opinion below should be resolved by this Court so that prospective investors, as well as owners of existing projects, can know authoritatively what their rights are.

B. May the Federal Government, in the absence of any navigation servitude or property right of the United States and solely in the exercise of its commerce power, take the property of Nantahala without paying just compensation by requiring acceptance of a license, providing for takeover of Nantahala's projects for less than just compensation, as a condition to permitting their continued maintenance and operation?

The constitutionality of Section 14 of the Act, which provides for takeover of the project at the end of the license term, is founded, under the doctrine of *U. S.* v. *Appalachian Power Co.*, 311 U. S. 377 (1940), upon the existence of a Federal servitude for navigation in navigable waterways.* The Federal government is under no duty to make these property rights available to any individual. It can impose such conditions on their use as it sees fit. The agreement by an applicant to turn over the facilities constructed, after a stipulated period and at a price to be determined by a stipulated formula, is in that context an appropriate condition.

In the instant case, and in every other case where FPC licensing jurisdiction is founded on the *Taum Sauk* doctrine, there is no navigational servitude or federal property right involved. The federal jurisdiction to license petitioner's developments is founded solely upon the effect on interstate commerce resulting from the transport of the electricity produced, and not upon the basis of effect on navigable capacity. Indeed, the Federal jurisdiction over petitioner's plants has no stronger foundation than that which underlies its power over a tomato cannery, or any comparable manufacturing enterprise, shipping its

* Or in certain instances, it is based upon the licensee's use of other federal property rights not involved here.

goods in interstate commerce. It is obvious that, as a matter of constitutional law, the Federal Government does not have the power to take over the tomato cannery without paying just compensation. In like manner, it does not have the power to take over petitioner's plants without the payment of just compensation.

There is no question but that in either case, the case of the tomato cannery, or petitioner's projects, Congress has the power to *regulate* the interstate activities in question. However, any *prohibition* against interstate commerce in either cans of tomatoes or electricity could only be made if Congress found such activities would be injurious to public health, morals or welfare. See *United States* v. *Darby,* 312 U. S. 100, 114 (1941). It has never been held or intimated that the government could refuse to allow the tomato canner to engage in interstate commerce unless he agreed to waive his constitutional right to just compensation. This, however, is precisely what the Federal Power Commission has done by holding that Petitioner could not continue to operate its plants without waiving its constitutional right to just compensation, i.e., without accepting a license providing for recapture at less than fair value. The Court below did not decide the issue but held that the constitutional question was not justiciable at this time.

The Commission's declaratory order states quite clearly the intent to apply the requirements of Section 14 to Petitioner's projects (App. C, p. 12c). Under that section, Petitioner is required to surrender the projects upon the termination of the license for "net investment" plus severance damages. Net investment is defined by Section 3(13) of the Act to refer to original cost with certain adjustments. It is by its terms a bookkeeping figure which bears

no relation to fair market value. Section 14 itself specifically provides that only in the event of condemnation, as distinguished from takeover, just compensation must be paid. (See *United States* v. *Appalachian Power Co., supra,* at 427 (1940)). There can be no question that in accepting a license, including "acceptance by the licensee of all the terms and conditions of this Act * * *" (Section 6), a licensee is waiving the constitutional right of "just compensation" under the Fifth Amendment.

Furthermore, this Court also recognized the distinction which Petitioner now asserts between the federal right to impose such a condition where the navigational servitude is involved, and the right where there is merely regulation of interstate commerce. In *United States* v. *Kansas City Life Ins. Co.,* 339 U. S. 799 (1950), the Court said:

> "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power, and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation." 339 U. S. at 808.

Finally, although the property rights of every existing or future owner of a hydroelectric project licensable only by virtue of the *Taum Sauk* doctrine are at issue in this proceeding, an even broader question is raised. This issue is the extent of the power of the Federal Government acting under the commerce clause to effectively nullify the Fifth Amendment provisions for just compensation.

II.

The Court below has decided a Federal question in conflict with an applicable decision of this Court, and in conflict with the decision of another Court of Appeals on the same matter.

A. Is Petitioner entitled to have the constitutional issue (Point I B) judicially determined before Petitioner is required to decide whether to accept a license containing a waiver of petitioner's right to just compensation?

The Court below dismissed petitioner's arguments on the constitutional issue (I(B) *supra*) with the statement that they were not "ripe for decision" (App. A p. 23a). Petitioner submits that the Fourth Circuit's decision is contrary to logic and economic realities, and specifically contrary to this Court's decision in *Appalachian Electric Power* case, *supra,* and to the decision of the First Circuit in *Rumford Falls Power Co.* v. *FPC, supra.*

Even assuming, as the Court below apparently does (App. A p. 22a), that licenses will be granted which "will not expire for a number of years"* there is obviously a present burden upon the petitioner's property rights in the project. It is the difference between owning property in fee simple absolute, and holding property which is subject to an option at a set price below fair market value. Furthermore, if petitioner's projects are subject to licensing jurisdiction as the lower Court held, the Petitioner is faced with the immediate decision whether to accept any license proffered, with the Section 6 waiver of any objec-

* There is no basis in the Act, or in the Commission's declaratory order, for such an assumption; indeed the Act sets no standard to determine the term of license on a permitted project if, indeed, the Commission finds a license to be appropriate.

tion to the terms of the Act, or cease maintenance and operation of the projects. In view of these circumstances there is no basis whatever for the Fourth Circuit's conclusion that the Constitutional question is not ripe for decision.

This Court took cognizance of the immediate burden placed upon a project owner in these circumstances in *United States* v. *Appalachian Power Co., supra,* where the precise issue of the timeliness of a challenge to the Constitutionality of Section 14 was raised. The government contended, as does the Court below, that consideration of the validity of Section 14 and the license conditions based upon its language should be deferred until the government undertook to take over the project at the end of the license term. The Court disposed of such contention, stating at 311 U. S. 421:

> "Assuming that the mere acceptance of a license would not later bar the objection of unconstitutional conditions, even when accompanied by a specific agreement to abide by the statute and license, we conclude that here the requirements of §14 so vitally affect the establishment and financing of respondent's project as to require a determination of their validity * * *".

The First Circuit Court of Appeals has also recognized that there must be a prior right to adjudicate the propriety of license conditions tendered to an applicant, even where there is no immediate threat by the government to exercise rights under those conditions. It dismissed a Commission claim that the appeal was premature with the comment that, "Rarely have we seen a more specious contention". *Rumford Falls Power Co.* v. *Federal Power Commission, supra,* at 688.

The writ of certiorari sought should appropriately issue to resolve this conflict between the Fourth and First Circuits and between the Fourth Circuit and the decision of this Court in the *Appalachian Power Co.* case, *supra*, as to the timeliness of appeal from license conditions imposed under the Federal Power Act and similar statutes.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 13, 1967

Appendix A—Opinion of the Court of Appeals

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 11,023.

NANTAHALA POWER AND LIGHT COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION.

(Argued May 2, 1967. Decided September 14, 1967.)

Before SOBELOFF, BOREMAN AND WINTER, Circuit Judges.

Randall J. LeBoeuf, Jr., (Halcyon G. Skinner and Ronald D. Jones, and LeBoeuf, Lamb & Leiby on brief) for Petitioner, and John C. Mason, Deputy General Counsel, Federal Power Commission, (Richard A. Solomon, General Counsel, Howard E. Wahrenbrock, Solicitor, Joseph B. Hobbs and George F. Bruder, Attorneys, Federal Power Commission, on brief) for Respondent.

SOBELOFF, Circuit Judge:

Under the decision of the Supreme Court in *F.P.C.* v. *Union Electric Co. (Taum Sauk)*, 381 U. S. 90 (1965), hydroelectric developments situated on the headwaters and tributaries of navigable waterways, and previously thought to be beyond the licensing authority of the Federal Power Commission because they did not affect "downstream navigability," were brought within the ambit of the Commission's jurisdiction if they "generate energy for an interstate power system."[1]

Petitioner's facilities were built before *Taum Sauk* and the Commission had erroneously held them free from the licensing and provisions of section 23(b) of the Federal Power Act, 16 U.S.C. §817(b),[2] because of the Commis-

1. F.P.C. v. Union Electric Co. (Taum Sauk), 381 U. S. 90, 95 (1965).

Commission licenses must be obtained prior to the construction of a facility which the Commission finds will affect "the interests of interstate or foreign commerce." Federal Power Act, § 23(b), 16 U.S.C. § 817(b).

Before *Taum Sauk*, the Commission had uniformly held that the only "commerce" that was relevant in determining its jurisdiction under section 23(b) was commerce on the downstream navigable waterway. In *Taum Sauk*, the Commission expanded its horizons to include, as affecting commerce, projects utilizing water power for the interstate transmission of electricity, 27 F.P.C. 801 (1962), and the Supreme Court upheld the Commission's view of the scope of its jurisdiction. F.P.C. v. Union Electric Co. (Taum Sauk), *supra*.

2. Section 23(b) provides in pertinent part that:

"Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign com-

sion's view of the law at that time that since they did not affect "downstream navigability," it followed that they could not bear the necessary relationship to interstate commerce. The question for decision is whether these facilities may now be subjected to the licensing provisions if they in fact affect interstate commerce, thus satisfying the expanded jurisdictional base announced in *Taum Sauk*.

From 1940 to 1949, Nantahala Power and Light Company, a wholly-owned subsidiary of the Aluminum Company of America (ALCOA), filed with the Commission in accordance with section 23(b) "declarations of intention" to construct seven hydroelectric developments in the Little Tennessee River basin. After investigation, the Commission found that none of the proposed developments would affect "the interests of interstate or foreign commerce," which, at that time, meant only that the Commission apprehended no effect on downstream navigability. Construction of the facilities without licenses was accordingly authorized by the Commission, upon compliance with the state law. The last of the seven developments was completed in 1955.

Shortly after the decision in *Taum Sauk*, the Commission wrote to owners of unlicensed hydroelectric developments, including the petitioner, requesting them to file license applications for facilities which that decision brought within the purview of the Commission. Nantahala responded with a petition for a declaratory order that its

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merce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

seven developments were exempt from the licensing provisions of the Act. Accepting for purposes of decision the facts as set forth in Nantahala's petition, the Commission held that licenses were obligatory. The present appeal followed denial of Nantahala's petition for reconsideration.

In our court, Nantahala renews the three arguments it presented to the Commission, and we shall deal with each in turn.[3]

I

Petitioner's principal contention is that a Commission finding under section 23(b) that a proposed facility would not affect commerce clothes the developer with irrevocable congressional permission to construct and operate the development, without his ever needing to apply for and obtain a license.

Nantahala acknowledges the principles, as indeed it must, that it is within the power of Congress to delegate to the Commission authority periodically to review and revise the status of developments earlier found not to affect commerce;[4] if a change in the facts or the law warranted, the Commission could then require that licenses be secured.[5] It maintains, however, that a uniform course of Commission interpretation, as well as the legislative history of the Act, supports the view that Congress expressly

3. Nantahala concedes that the seven developments "generate energy for an interstate power system." If the present appeal is decided adversely to Nantahala, they are therefore within the Commission's jurisdiction, as defined by *Taum Sauk*.

4. *See* Lichter v. United States, 334 U. S. 742, 778 (1948):
"A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." (Emphasis in original.)

5. *See* Louisville Bridge Co. v. United States, 242 U. S. 409 (1917).

refrained from vesting the Commission with continuing supervisory jurisdiction, once it has determined that the development would not affect commerce.

In harnessing the latent power in our thousands of waterways, complex problems emerge regarding the most efficient methods of creating and channeling into a unified system the immense volume of kilowatt hours of energy required to meet the needs of the nation. Through the imaginative exercise of its broad regulatory authority, which in significant measure is implemented by the imposition upon licensees of various terms and conditions of operation, the Commission plays a vital role in insuring that our power supply is kept apace with the demand.[6] The recent black-out of the northeastern section of the United States furnishes dramatic illustration of the vital

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6. A representative sampling of the conditions of operations imposed upon licensees is contained in Nantahala's brief. Among the Commission's "Standard License Conditions" are the following:

"1. Licensee may be required at any time to install additional capacity or make other changes in the plants.

2. Licensee must accept Federal Power Commission plans for coordinating its system operations with area utility operations.

3. Licensee may be required at any time to construct and operate facilities for the conservation and development of fish and wild life resources and other recreation purposes, to construct preventive works for soil erosion, and to install stream gaging stations.

4. Licensee may not lease or sell property used or useful for project operations without Commission approval.

5. Licensee must permit reasonable use of its project by others for industrial, municipal and other purposes.

6. Upon abandonment, licensee must remove all structures from the stream. (*Standard License Conditions,* Form L-11, 34 F.P.C. 602, 1965)."

In addition, of course, there are enormously important controls over corporate financing and rate making for the protection of the consuming public. *See* notes 32 and 33 *infra* and accompanying text.

national interest in the proper regulation of facilities for the generation of electricity. It is therefore not without good reason that a court will hesitate to read into section 23(b) a congressional purpose to grant to Nantahala, and similarly situated owners, an indefeasible right to be free from the licensing provisions of the Act.

To counter the force of these considerations, petitioner mounts the argument, based upon early statements by the Commission and its employees and testimony before Congress, that in order to foster private investment in the development of electrical energy, Congress deliberately chose to offer to investors the incentive of license-free operation, after an initial Commission determination that the proposed facilities would not affect commerce. Nantahala states that it constructed the seven developments with which we are here concerned in reliance upon the prospect of independence from the burdens of licensed operation, and that this reliance interest is entitled to protection.

A sampling of the statements and testimony stressed by Nantahala as underpinning its position is helpful in illuminating the present controversy. The First Annual Report of the Commission, published in 1921, contained the following observation:

> "If the Commission finds that the interests of interstate or foreign commerce are not affected, the act grants authority to proceed in compliance with State law, and the declarant is freed from any subsequent liability to the United States under any existing or future acts of Congress regardless of conditions that may thereafter arise * * *. It is only when a declaration [of intention] is filed and a decision rendered in the manner prescribed in the act that the finding

of the Commission becomes conclusive and binding both upon the declarant and the United States."[7]

Three years later the Commission commented:

> "Under these earlier statutes and decisions there was reserved a continuing power to the Secretary of War to require the removal or alteration of obstructions to accommodate changes in the mode of navigation or in the extent of use dependent upon economic conditions. [Citation omitted.] Section 23 of the Federal water power act was an evident effort to give to power structures in nonnavigable streams a more certain tenure. Once the structure was authorized under this section it becomes impossible for the Secretary of War to order changes to accommodate a traffic created by changed conditions."[8]

In 1927, the Chief Counsel of the Commission identified two purposes to be served by section 23, as follows:

> "(1) to protect the interests of navigation * * * (2) to protect applicants by providing a means whereby they can have an authoritative ruling before investment is made."[9]

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7. 1 FPC Ann. Rep. 54 (1921).
Under section 23 of the Federal Water Power Act, 41 Stat. 1075 (1920), the filing of declarations of intention was discretionary. When section 23 was incorporated into section 23(b) of the Federal Water Power Act, 49 Stat. 846 (1935), 16 U.S.C. § 817 (1964), it was amended to impose mandatory filing of declarations of intention.

8. FPC, Decisions of the Federal Power Commission on Declarations of Intention Under Section 23 of the Federal Water Power Act, at 36 (1926).

9. 7 FPC Ann. Rep. 155 (1927).

The views expressed in the above quoted statements were, petitioner asserts, presented to, and accepted by, Congress in 1935 during consideration of the Federal Power Act. They were submitted by the Solicitor of the Commission in the following language:

> "The effect of section 23 is to permit a proper determination in advance of the construction of the project as to whether or not it will affect interstate and foreign commerce. That determination having been made, a license is required or it is not required under the act according to the facts that are shown. If it is a fact that interstate or foreign commerce will not be affected *the construction work* can be done, without a license. If the facts show that interstate or foreign commerce will be affected *the construction work* cannot be done without a license."[10] (Emphasis added; the significance of the italicized language is discussed later in this opinion.)

Petitioner also points to testimony before a House Subcommittee in 1947, some years after the passage of the 1935 Act, by the General Counsel of the Commission, to the effect that:

> "The Commission cannot reserve jurisdiction under the Federal Power Act. If they find the proposed development does not affect interstate commerce, it cannot reserve jurisdiction."[11]

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10. Hearings on H.R. 5423 before the House Interstate and Foreign Commerce Comm., 74th Cong., 1st Sess., at 472 (1935).

11. Hearings on H.R. 2972 and H.R. 2973 Before the Subcomm. of the House Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess., at 443 (1947).

We are not persuaded that these expressions establish a consistent course of Commission interpretation, or provide substantial support for a finding that the last sentence of section 23(b) manifests congressional approval of the position urged upon us. More significant, more precise and more authoritative than the observations of the Commission and its employees is the unadorned language of the Act.[12] With respect to a development whose operation the Commission has determined will affect commerce, the penultimate sentence of section 23(b) provides that the developer "shall not construct, maintain, or operate such dam or other project * * * until it shall have applied for and shall have received a license * * *." In striking contrast, if the Commission finds that the project will *not* affect commerce, the final sentence of that section only authorizes the developer to "construct such dam * * * upon compliance with State laws."

Interpreted literally, deletion from the latter phrase of the words "maintain or operate" would support the conclusion that Congress meant to permit license-free "construction" only of developments found to have no presently discernible effect on commerce; "maintenance and operation" would still be subject to the licensing provisions. With Nantahala, however, we are of the view that a purely linguistic approach would not fully satisfy the search for the congressional scheme. But we do not agree with the suggestion in petitioner's brief that the words "maintain

12. Even were we satisfied that there was a consistent course of Commission interpretation supporting Nantahala's contention, "consistent error is still error," Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672, 678 n.5 (1954), and neither the Commission nor the courts would be precluded from correcting an erroneous interpretation of the law, as evidenced by the Commission's decision in *Taum Sauk*, upheld by the Supreme Court. *See also* Louisville & Nashville R.R. v. United States, 282 U. S. 740, 759 (1931).

or operate" were deleted because "Congress assumed that if there were no effect on interstate or foreign commerce, the proposed dam would not be subject to any of the numerous requirements imposed upon licensees." One should hesitate to attribute to Congress a vision so short-sighted, designedly excluding the possibility that changed circumstances may create an effect on commerce where none previously existed. It is more reasonable to inquire whether, in the circumstances, there is justification for refusing to give any tangible effect to the obvious modification of parallel clauses in consecutive sentences.

It requires no subtle straining to arrive at a more sensible interpretation of section 23, in light of the history and purpose of the Act. Our view can be succinctly stated in the following propositions:

(1) Once a finding of lack of effect on commerce is made, section 23(b) authorizes the developer to construct the facility without a license.

(2) Construction having been completed, the Commission is without authority later to say that the finding of lack of effect on commerce was in error and that therefore the developer violated the law by failing to obtain a license.

(3) As long as the Commission adheres to the view that the development has no effect on commerce, license-free maintenance and operation of the facility is authorized.

(4) When, however, the Commission determines that a change in the underlying facts, or a correct exposition of the applicable law, discloses that the facility does affect commerce, continued maintenance and operation is conditioned upon the procurement of a license.

Once the development is found to affect commerce, no grant of immunity from licensing can fairly be implied for maintenance and operation, as well as construction.

The Federal Power Act of 1935 was

> "[t]he outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, * * * instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other Federal laws previously enacted.
>
> It was major undertaking involving a major change in national policy. (Footnote omitted.)"

First Iowa Coop. v. *F.P.C.*, 328 U. S. 152, 180 (1946).

Consistent with this felt need, section 23(b) amended section 23 of the Federal Water Power Act to impose a mandatory requirement for declarations of intention prior to construction.[13] As the Commission declared in the declaratory order in the case, "[s]ection 23(b), * * *, was added to the Act in 1935 to give the Commission more effective control of the hydroelectric industry."[14] To attribute to pre-1935 statements controlling effect in determining the scope of that section would undermine this congressional purpose,[15] for developments once exempted

13. *See* note 7, *supra.*

14. 36 F.P.C. ....., ... (1966).

15. The Commission's observation, to which Nantahala refers us, that section 23 was intended to "give to power structures in nonnavigable streams a more certain tenure" by restricting the Commission's right to require "removal or alteration" of previously approved facilities in the light of changed conditions, *see* note 8 *supra* and accompanying text, is totally inapposite in the context of the present case. The Commission is not claiming the right to require structural changes in the developments, lawful when constructed, but merely the right to subject them in the future to the licensing provisions of the Act.

To the extent that the Commission was of the view that section 23 was meant only to insulate developments from future structural changes, the other pre-1935 statements upon which the Company relies, see pages 6 and 7, *supra*, provide little, if any, support for the claim Nantahala advances in this case.

by the Commission from its licensing authority could never be subjected to any sort of supervision or regulation, and the goal of "comprehensive development of the water resources of the Nation" would be severely frustrated.[16]

The abbreviated excerpt from the General Counsel's 1947 remarks, made *after* the Act was amended, concerning the Commission's power to reserve jurisdiction, in no way undermines our position, for the General Counsel went on

16. *See* Northwest Paper Co. v. F.P.C., 344 F. 2d 47 (8th Cir. 1965). There Congress in 1886 passed a Special Act giving permission to the predecessors in interest of Northwest to construct a dam and appurtenant facilities for the generation of water power across the Mississippi River. Congress expressly reserved the power to "alter, amend, or repeal" the Act. In 1950, after passage of the Federal Power Act, Northwest obtained the consent of the Army Corps of Engineers to reconstruct the dam in response to a flood which virtually destroyed the entire facility.

In a declaratory proceeding in 1963, the Commission held that Northwest violated section 23(b) of the Federal Power Act by rebuilding the dam in 1950 without having applied for and obtained a license. Northwest's defense before the Commission was that the 1886 Act brought it within the exemption of section 23(b) for the unlicensed construction and operation of facilities "in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920 * * *," and that it therefore had the indefeasible right in perpetuity, to replace the original project with other facilities, subject only to the limitations contained in the Special Act.

The court quoted with approval the Commission's rejection of this argument on the ground that

> " 'It is unreasonable to assume, * * * that Congress was delegating to a specialized expert body the obligation of securing comprehensive development of the nation's power resources, while reserving to itself the responsibility of continued surveillance over all locations where any developments had been constructed under previously granted permits.' "

344 F. 2d at 52. *See also* Minnesota Power & Light Co. v. F.P.C., 344 F. 2d 53 (8th Cir. 1965) (companion case).

As in *Northwest Paper,* were we to accept Nantahala's contention that it is entitled to immunity from the licensing provisions of the Act, Congress alone, and not the body of experts to which it has delegated the responsibility of "securing comprehensive development of the nation's power resources," would have the policing obligation.

to say that in his opinion the language of section 23(b), which gives consent

> "for the construction of a proposed development upon compliance with State laws [was] unnecessary because if the stream is subject to Federal jurisdiction it is so regardless of what the Federal Power Commission may or may not do. If it is not subject to Federal jurisdiction Congress or the Federal Power Commission or any other Federal agency cannot make it so."[17]

There is no indication that the General Counsel thought that the Commission lacked jurisdiction over developments which, while initially not found subject to federal regulation, subsequently are determined to exert an influence on commerce.

The Commission, itself, has provided the complete answer to the Company's claim that the body has uniformly declined to reserve jurisdiction over developments once found not to affect commerce. In approving unlicensed construction of four of petitioner's seven developments here involved, the Commission said:

> "However, it should be plainly stated that further development of the watershed of the Little Tennessee River may so change the material facts upon which we based our findings as to individual projects, that reexamination of the effect upon the navigable capacity of the Little Tennessee River of a series of developments in combination may be re-

17. Hearings on H.R. 2972 and H.R. 2973 before the Subcommittee of the House Commission on Interstate and Foreign Commerce, 80th Cong., 1st Sess., at 443 (1947).

> quired. It is conceivable, therefore, that while there may be no basis at the time a declaration of intention is filed for requiring a license for a single development, such a development in combination with others in the watershed may later be found to affect the interests of interstate commerce and hence Federal licenses might then be required for all the developments in the headwaters."

8 F.P.C. 1117, 1119 (1949). The Commission accordingly qualified its formal finding with the proviso that

> "these findings shall not be construed as relating to any effects upon the interests of interstate commerce which might be caused by any other hydroelectric developments, existing or prospective, individually or in combination with the developments involved herein, within the basin of the Little Tennessee River."

The Company argues that the above quoted proviso did not reserve jurisdiction, but merely gave notice that the Commission's findings of no effect on commerce "should not be construed as barring the possibility that licenses might be required for other developments." Plainly, this misconceives the thrust of the proviso. In unequivocal language the Commission was admonishing the applicant that while Nantahala's facilities might not then have the necessary impact on commerce, these facilities plus those that might later be constructed (by Nantahala or by others) could in combination well exert a substantial enough effect. In that event, Nantahala might be required to apply for licenses covering developments already built and in operation.

In concluding this part of our discussion, it is worth recalling that, as heretofore noted on page 8, the Commission's Solicitor, in his testimony before Congress, alluded to "construction work" only as being freed from the licensing provisions of the Act, by a finding of lack of effect on commerce.

We turn next to petitioner's asserted reliance upon license-free operation. The ready answer is provided by the Supreme Court, which said in *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 420 (1917):

> "It is true that Congress must have contemplated that a large investment of private capital would be necessary, and that the bridge when once constructed could not be abandoned or materially changed without a total or partial loss of value. This is a very grave consideration, and we have not at all overlooked it; but we cannot deem it controlling of the question presented. It may be assumed that the parties foresaw, what experience since has demonstrated, that it would be many years before changing conditions of navigation would render the bridge out of date, and that the investors were satisfied with the prospect of the profit to be gained from the use of the bridge in the meantime."

There a bridge owner failed in its attack on an order of the Secretary of War requiring it to undertake major structural changes in the bridge, which when built exceeded the minimum clearances mandated by statutes in force at the time of construction. In the present case, the burden imposed on Nantahala is no greater—indeed it would seem less onerous—for it need only conform its future operations to the reasonable regulations promulgated by the

Commission and imposed alike upon all owners of developments that affect commerce.

In view of the national interest in regulating our natural resources of electrical power, we are justified in protecting only those "reliance" interests that are based upon exemptions clearly delineated by Congress. Unless the inference is unambiguous and compelling, a court would not be warranted in upholding a claim that Congress meant to create an indefeasible private right springing from an initial exercise of the Commission's regulatory authority, that would survive and remain immune from future regulation under any circumstances. This thought finds authoritative expression in the following language of the Court in *Louisville Bridge*:

> "* * * when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power [to regulate commerce], the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. As this court, speaking through Mr. Chief Justice Waite, declared in *Bridge Company* v. *United States*, 105 U. S. 470, 480: 'Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and inter-state commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was

> manifestly so intended. Every doubt should be resolved in favor of the government.'"

242 U. S. at 417-418.

Nantahala misconstrues the impact of *Louisville Bridge* when it attempts to distinguish that case on the ground that there

> "* * * the question was whether Congress could revoke by statute earlier special acts granting permission to construct a bridge across a navigable water of the United States. In the instant case Congress has not taken any action to revoke its permission. It is the Commission, created by the same Act that provides the Congressional permission, that is attempting to revoke such permission without Congressional authorization and in derogation of specific provisions of the statute."

In *Louisville Bridge,* the investor argued that the earlier statute gave him an "irrevocable franchise" to construct and maintain the bridge. Paralleling the Bridge Company's argument, almost in its very words, the Power Company here contends that section 23(b) affords it "indefeasible permission" to operate its developments without licenses. The task here, as in *Louisville Bridge,* is to ascertain the extent of the immunity conferred by Congress. We reject as irrelevant the issue framed by Nantahala, whether the Commission is empowered unilaterally to retract a congressional grant.

Nantahala suggests that acceptance of the Commission's position carries with it the "anomalous result" that developers whose projects were initially found to affect commerce would be in a more enviable position than those whose pro-

jects were initially found not to affect commerce, but found to affect commerce sometime after construction. Only in the former case, Nantahala reasons, would the developer have had the opportunity to weigh all relevant considerations, including licensed rather than unlicensed operation, *before* construction.

The anomaly is more fanciful than real. The greater latitude afforded the developer who enjoys a period of years of license-free operation,[18] may, in terms of financial reward, be more than adequate to offset the uncertainty said to attend the development's future status. However this may be, on the record before us, it cannot be said that the utility is being shortchanged, or stands in danger of being seriously disadvantaged in the future. That investors have not hesitated to construct facilities which from their inception were subject to licensing is evidence that the financial yield of regulated developments is sufficiently attractive to overcome any actual, as opposed to theoretical, unfairness to Nantahala.

What we have said to this point answer the Company's contention that the Commission may not employ its ancillary administrative powers, conferred in section 4(g) of the Act,[19] or the doctrine that an administrative agency

18. Nantahala's seven developments have been in operation for periods ranging from 12 to 25 years.

19. Section 4(g), 16 U.S.C. § 797, provides that the Commission is empowered:

> "Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region."

has inherent power to correct mistakes of law,[20] to "extend the scope of Commission jurisdiction under section 23(b)." Since, as shown, Congress never intended that a determination of lack of effect on commerce would forever oust the Commission of jurisdiction, it follows that the Commission had authority to issue the order under review.

It is therefore not necessary to rest decision on the ground that section 4(g) affirmatively reflects a strong congressional purpose to vest broad continuing power in the Commission to regulate the use of navigable streams and "to issue such order as it may find appropriate, expedient, and in the public interest * * *." In no event would we be disposed to accept the Company's view that the section is merely procedural. Not only is the section physically separated from the procedural provisions,[21] but it evinces a meticulous design to conserve the national interest. In *Union Electric Co.* v. *F.P.C.*, 326 F.2d 535 (8th Cir. 1964), *reversed on other grounds*, 381 U.S. 90 (1965), the Eighth Circuit, while denying Commission jurisdiction on the theory of interstate transmission of electricity, nevertheless stated that:

> "If in the operation of the project it later develops at any time in the future that the *navigability* [the traditional basis of Commission jurisdiction, *see* note 1, *supra*, to which the Eighth Circuit erroneously held the Commission was restricted] of the Black River is impaired or threatened to be im-

326 F. 2d at 553.

20. *See* Automobile Club of Michigan v. Commissioner, 353 U. S. 180 (1957). *See also* United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 229 (1965): "An agency, like a court, can undo what is wrongfully done by virtue of its order."

21. Compare the placement of section 309 of the Act 16 U.S.C. § 825(h).

paired, the Commission would have authority under § 4(g) of the Act to issue an appropriate order, including an order to prevent further operation of the project without a license." (Emphasis added.)

326 F. 2d at 553.

II

The second line of defense interposed by Nantahala is that to require it to obtain licenses covering the seven developments would amount to an unconstitutional taking of property without just compensation, in violation of the Fifth Amendment.

The argument is rather involved. It is premised upon section 14 of the Act, 16 U.S.C. § 807, which provides that the United States may, at the expiration of the license period, "take over" any development, in return for which it shall pay "the *net investment* of the licensee * * * not to exceed the fair value of the property taken. * * *."[22]

22. Section 14 of the Act reads in relevant part:

"Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. * * * *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved."

(Emphasis added.) The difference between the net investment in the seven developments and their fair value at the time of recapture is the amount by which it is asserted that just compensation might be denied.[23]

The recapture provisions of the Act have survived constitutional attack when applied to developments in navigable waterways, or facilities so situated as to affect them.[24] The rationale of these decisions, according to petitioner, is that with respect to navigable waterways, there exists a dominant federal servitude that gives the federal government the unfettered right to prohibit all construction.[25] On the theory that the greater right includes the lesser, petitioner acknowledges that the federal government may therefore grant the right to construct on any terms it chooses, including recapture at less than fair value.

With respect to the seven developments involved in this appeal, however, petitioner maintains that the Commission's finding that they exert no influence on down stream navigability negates the existence of a dominant federal servitude. According to petitioner's contention, no property right of the federal government being at stake, the

23. For purposes of our decision, we accept without discussion Nantahala's contention that to satisfy the Fifth Amendment, compensation must equal fair value, and that, normally, net investment value, as defined in section 3(13) of the Act, 16 U.S.C. § 796, is less than fair value. *Cf.* United States v. Appalachian Power Co., 311 U. S. 377, 427 (1940).

Support for this view may be found in the proviso to section 14 of the Act, which preserves the right of the United States to recapture a licensed development "at any time * * * upon payment of just compensation * * *." *See* note 22, *supra.*

24. *See, e.g.,* United States v. Appalachian Power Co., 311 U. S. 377 (1940); Niagara Falls Power Co. v. F.P.C., 137 F. 2d 787 (2d Cir.), *cert. denied,* 320 U. S. 792 (1943).

25. Petitioner points to the discussion contained in United States v. Kansas City Life Ins. Co., 339 U. S. 799, 808 (1950).

asertion of federal authority is based exclusively upon the government's right to regulate commerce—specifically the interstate transmission of electricity. Where, as here, the activity in commerce has not been found injurious to the public health, the argument runs, Congress may not prohibit it entirely but may subject it to reasonable regulation only, which, it is asserted, does not encompass recapture at less than fair value.

We do not find it necessary to evaluate this labored argument, which is based upon a conceptual distinction bearing no relationship to the realities in the regulation of the national power system, for we think that, on the record before us, decision of the fine spun Fifth Amendment question would be premature.

On oral argument of this appeal, we were informed that in 1968, upon expiration of the earliest licenses, granted for not exceeding 50 years, the Commission will have its first opportunity to consider license renewals. No indication is available as to what the Commission's policy may then be in this regard. If Nantahala now applies for and obtains licenses, they will not expire for a number of years.[26] There is absolutely no basis for a reasoned prediction that the Commission will attempt to invoke the recapture provisions upon expiration of the licenses to be issued for the seven developments. Neither can one predict with any measure of assurance that if recapture is sought, the fair value at the time of recapture will exceed the net investment. Also, possible future changes in the bed of the Tennessee River, or its tributaries or the use of riparian lands, may create an effect on "downstream navigability," and the developments may thereby become subject to what even Nantahala acknowledges as the govern-

26. *See* Section IV, *infra*.

ment's limited right of recapture at less than fair value. Thus, not only the possibility of recapture, but the possibility of recapture upon terms raising Fifth Amendment questions, is so speculative that the constitutional question is obviously not ripe for decision.

III

The petitioner's third and final proposition is that it is exempt from licensing by virtue of section 26(a) of the Tennessee Valley Authority Act, 16 U.S.C. § 831y-1, because of its relationship to the TVA.[27] Petitioner contends that in light of the Fontana Agreement,[28] which gives the

27. Section 26(a) reads in pertinent part that:

"The requirements of this section shall not be construed to be a substitute for the requirements of any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be *constructed, operated, or maintained* by the Corporation, shall be required, notwithstanding the provisions of this section." (Emphasis supplied).

28. The Agreement became effective on August 14, 1941, and, as amended on December 27, 1962, is currently in force. It was entered into pursuant to section 26(a) of the Tennessee Valley Authority Act, 16 U.S.C. § 831y-1, which provides that:

"The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board."

TVA the right to control the impounding and releasing of water at the seven plants, and also makes available to the TVA all energy generated at the plants, the TVA "operates" the developments within the meaning of the exemptive provision of section 26(a).

ALCOA unsuccessfully advanced the identical argument to the Commission in 1954, with respect to other facilities owned by it.[29] Nantahala criticizes the earlier decision on the ground that there the Commission unduly restricted the scope of the word "operate" by excluding from its reach all developments except those physically operated by the TVA.

The terms of the agreement disclose no support for the claim to exemption. True, under the agreement petitioner does not retain an unfettered right to generate electricity when, where, and in amounts it chooses, and it is subject to regulations imposed by the TVA in light of that corporation's responsibility to coordinate all power operations within the Tennessee River watershed.

However, were we to infer from these incidents of control, an "operation" of the facilities by the TVA in the broad sense advocated, the result would be startling indeed. It would, in effect, exempt from the Power Act's licensing requirements all developments in the Tennessee River system, for anyone wishing to construct a power facility in the Tennessee River watershed must first obtain approval of the governing Board for a plan of operation that will harmonize the activities of the facility with those of other developments in the Tennessee River system.[30] All owners would be freed from regulation except to the limited extent outlined in agreements similar to the Fontana Agreement, which is solely concerned with the "coor-

29. Aluminum Co. of America, 13 F.P.C. 14 (1954).

30. *See* footnote 28, *supra.*

dinated operation of power facilities" in the Tennessee River system.[31] The Commission, whose interests are broader than those of the TVA, and certainly no less important, would be precluded from implementing needed improvements or modifications consistent with the *national* interest.

In addition, under section 20 of the Federal Power Act, licensed utilities are restricted to charging rates "reasonable, nondiscriminatory, and just to the consumer * * *."[32] The Commission also retains certain supervisory powers under section 10(d) over the financial operations, accounting practices, and rates of return of licensed utilities.[33] On the other hand, developments "constructed, operated or maintained" by the TVA, because of their character as "government corporations," are not subject to similar restrictions. We are of the view that the more reasonable construction of the section 26(a) exemption is that made by the Commission in 1954, namely, that only facilities either owned by the TVA, or whose actual day-to-day physical operation is undertaken by the TVA, are exempt from the licensing provision of the Act. There is no justification for converting what was designed as a limited exemption on behalf of a government corporation into a sweeping exclusion that may be availed of by every private power enterprise operating within the Tennessee River watershed.

We do not overlook the petitioner's earnest representation that to bring its facilities within the Commission's regulatory power would, in light of the control exercised by the TVA under the Fontana Agreement, subject it to

31. The quoted language is the title of Article II of the original Fontana Agreement.

32. 16 U. S. C. § 813.

33. 16 U.S.C. § 803(d).

two masters, who may not always see eye to eye. We think, however, that the fear is exaggerated. Article VI(1)(a) of the amended agreement, set forth in the margin,[34] provides ample basis for an accommodation among the interested parties, which will obligate Nantahala to obey only one set of consistent directives.

IV

We hold that the Commission is empowered to require petitioner to apply for and obtain licenses for the seven facilities here at issue. Because this Company has oper-

34. "1. *Limitations, Restrictions, and Waivers.*

(a) It is recognized by the parties that Company is or may be subject to laws, orders, restrictions, regulations, decrees, or licenses of the United States of America or its agencies (excluding TVA) or of certain states or their agencies with respect to Company's generating plants and transmission facilities. Company shall keep TVA informed thereof and, upon request by TVA, Company will contest the validity of any such laws, orders, restrictions, regulations, decrees, or licenses which to any extent greater than heretofore established or recognized by Company deprive Company of the ownership, control, or right to operate any of its hydroelectric plants or any of its transmission facilities. In the event and to the extent that, and for so long as, Company is involuntarily deprived of the ownership, control, or right to operate any of such plants or any of its transmission facilities by decree of court or by any laws of actions of the United States, of any state, or of any of the agencies of either of them, Company's obligations hereunder to that extent shall cease to be binding and an equitable adjustment shall be made in the amount of normal power TVA is obligated to make available to Company pursuant to section 1 of Article IV hereof."

The express recognition in Article VI(1)(a) that Nantahala "is or may be subject to * * * regulations * * * of the United States of America or its agences (excluding TVA)" cuts against exemption for the developments from Commission licepsing. It provides some support for the view that both the Company and the TVA were aware of the real possibility that the facilities were subject to Commission licensing, notwithstanding the incidents of control which the agreement vested in the TVA.

ated the developments over the past 12 to 25 years in good faith reliance upon Commission findings that they do not affect commerce, a question possibly arises whether the Commission is entitled to back-date the licenses, and thereby shorten their maximum 50 year term, to the respective dates of completion of the projects.[35] We refrain from expressing any opinion on this point, or in respect to other adjustments that may appropriately be made in view of the delayed licensing. If, in proceedings following this decision, an issue of this character should be determined adversely to the applicant, it may, of course, seek review.

For the reasons stated, the Commission's order will be enforced.

Enforced.

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35. *Compare* Central Maine Power Co. v. F.P.C., 345 F. 2d 875 (1st Cir. 1965). *See also* Rumford Falls Power Co. v. F.P.C., 355 F. 2d 683 (1st Cir. 1966).

Appendix B—Statutes Involved

FEDERAL POWER ACT

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

* * * * *

SEC. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743,

Revised Statutes, as amended (U.S.C., title 41, sec. 20). [1067, 49 Stat. 841; 16 U.S.C. 799]

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before

taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

SEC. 15. That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be

issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided,* That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

SEC. 23.

* * * * *

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and

among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Appendix C—FPC Declaratory Order

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

NANTAHALA POWER AND LIGHT COMPANY

Docket No. E-7261

DECLARATORY ORDER

(Issued July 18, 1966)

The question presented is whether the Commission is foreclosed from requiring a license for operating and maintaining a hydroelectric development which affects the interests of interstate or foreign commerce within the Supreme Court's holding in *Taum Sauk*[1] by a Commission finding, which was made prior to the Supreme Court decision and which is not in accord with it, that the development would not affect such interests.

The proceeding arises on the Nantahala Power and Light Company's[2] petition for a declaratory order that seven constructed hydroelectric developments in the Little

1. *FPC* v. *Union Electric Co.*, 381 U. S. 90 (1965). Taum Sauk is the name of the development over which the Commission asserted jurisdiction in that case.

2. The company, a wholly owned subsidiary of the Aluminum Company of America, has its principal offices in Franklin, North Carolina.

Tennessee River basin do not require licenses under Part I of the Federal Power Act (16 U.S.C. 791-823).[3] It appears from the petition and is assumed for purposes of this proceeding that: (1) The streams on which the developments are located, being headwaters of navigable waters of the United States, are waters over which Congress has jurisdiction under the commerce clause. (2) The sections of the streams on which the developments are located are not themselves navigable waters of the United States. (3) The developments do not affect downstream navigable capacity. (4) Petitioner's power system is interconnected with those of Tapoco, Inc., and the Tennessee Valley Authority, and the energy produced at the developments enters the interstate power system formed by these interconnections.[4]

Section 23(b) of the Act requires anyone desiring to construct a hydroelectric development on a non-navigable stream, but one over which Congress has jurisdiction under the commerce clause, to file a declaration of intention. If the Commission finds that "the interests of interstate or foreign commerce would be affected by such

3. The developments and the streams on which they are located are as follows: (1) Nantahala project on the Nantahala River, Dick's Creek and White Oak Creek; (2) Thorpe project (formerly Glenville project) on the West Fork Tuckasegee River; (3) Queens Creek project on Queens Creek; (4) Tuckasegee project on the West Fork Tuckasegee River; (5) Cedar Cliff project on the East Fork Tuckasegee River; (6) Bear Creek project (formerly Bear Creek-Island Ford project) on the East Fork Tuckasegee River; and (7) Tennessee Creek project (formerly Wolf Creek project) on the East Fork Tuckasegee River.

4. The interconnection with TVA is pursuant to the so-called Fontana Agreements between the United States and Alcoa. The agreements, dating from 1941 and extending through 1982, provide that power generated by Petitioner be made available to TVA, which in turn make power available to Petitioner or Alcoa at the latter's aluminum smelting works at Alcoa, Tennessee. Tapoco, Inc., is another, wholly owned subsidiary of Alcoa.

proposed construction," the section prohibits the declarant from constructing, maintaining, or operating the development without a license. If the Commission makes the contrary finding, the section grants the declarant permission to construct the development upon compliance with state law. 16 U.S.C. 817.[5]

Petitioner's developments were built at various times between 1941 and 1955. Before construction was begun on each development, Petitioner filed the requisite declaration of intention. At the time the declarations came before the Commission, the "interests of interstate or foreign commerce" as used in Section 23(b) was treated as referring only to interests in navigation and water commerce. The Commission made the statutory finding, based on the existing facts and understanding of the law, that these

5. Section 23(b) provides in pertinent part:

> It shall be unlawful for any person . . . , for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation find that the interests of interstate or foreign commerce would be affected by such proposed construction such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, . . . permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws

interests would not be affected by the proposed construction.[6]

In *Taum Sauk,* handed down in 1965, the Supreme Court rejected the assumption which underlay these findings. "Congress," it held, "drew [in Section 23(b)] upon its full authority under the Commerce Clause, including but not limited to its power over water commerce." *FPC* v. *Union Electric Co.,* 381 U. S. 90, 96 (1965). A corollary of the holding is that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system."[7]

Shortly after *Taum Sauk* was decided by the Supreme Court, we corresponded with Petitioner, among other owners of constructed developments, in an effort to encourage voluntary filing of applications for licenses. Petitioner's request for a declaratory order that its developments do not require licenses was filed on November 29, 1965.

Petitioner contends, in effect, that the Commission is foreclosed from correcting findings on declarations of intention which were made favorably to the declarant under an erroneous interpretation of the statute. It argues that the Commission lacks statutory authority to reconsider its findings on declarations of intention, or if

6. The findings are reported at 2 F.P.C. 753 (Nantahala project), 2 F.P.C. 754 (Thorpe project), 6 F.P.C. 426 (Queen's Creek project), 6 F.P.C. 756 (additional project works of the Nantahala project), 8 F.P.C. 690 (Tuckasegee project), 8 F.P.C. 1117 (Cedar Cliff, Bear Creek, and Tennessee Creek projects). The Fontana Agreement providing for interchange of power between Petitioner and TVA had been signed before all but the first two of these findings, but is not referred to in them.

7. The Commission decision in *Taum Sauk,* which reached the same result as the Supreme Court decision, was issued in 1962. *Union Electric Co.,* 27 F.P.C. 801 (1962).

the Commission does have the authority, it is barred from exercising it by the doctrine of equitable estoppel. Petitioner states that when the Commission makes findings on declarations of intention that proposed construction would not affect the interests of interstate or foreign commerce, the declarant receives a Congressional permit in perpetuity for its developments under the final sentence of Section 23(b) of the Act.

We conclude that none of these arguments nor any of Petitioner's several ancillary arguments is valid, and we order Petitioner to apply for licenses.

I

The Commission's findings on Petitioner's declarations of intention were based, as we have noted, on an erroneous conception of the governing law. The courts have left no doubt that administrative agencies in general, and the Commission in particular, have authority to correct mistakes of law and are not estopped from exercising this authority. The leading case is *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180 (1957). There the Commissioner of Internal Revenue ruled in 1934 and 1938 that the petitioner was exempt from Federal income taxes because it was a "club" within the meaning of the internal revenue laws corresponding to Section 101(9) of the Internal Revenue Code of 1939 (26 U.S.C. (1935 ed., Supp. V) 101(9)). He revoked the ruling in 1945 and retroactively applied the revocation to 1943 and 1944. The Supreme Court, noting that the "Commissioner's earlier rulings were grounded upon an erroneous interpretation of the term 'club' in §101(9) and thus were based upon a mistake of law," stated (*id.* at 183):

> The petitioner argues that, in the light of the 1934 and 1938 rulings, the Commissioner was equitably

> estopped from applying the revocation retroactively. This argument is without merit. *The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.* (Emphasis added.)[8]

See also *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223 (1965). "An agency, like a court, can undo what is wrongfully done by virtue of its order."[9]

This principle was applied to Part I of the Federal Power Act in *Niagara Falls Power Co.* v. *FPC*, 137 F.2d 787 (2d Cir. 1943), *cert. denied*, 320 U. S. 792 (1943). The error there was in the interpretation of Section 23(a) of the Act (16 U.S.C. 816). The section provides that if the holder of a permit which was issued prior to approval of the Act surrenders the permit and obtains a license, the Commission will determine the net investment in the development according to its fair value. Niagara Falls had held several Federal water diversion permits, but when the Act was approved, the last of these expired by its terms, and Niagara Falls was left with only state water diversion rights. The Commission, interpreting "permit" as used in Section 23(a) to refer to state as well

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8. *Cf., United States* v. *San Francisco*, 310 U. S. 16, 31-32 (1940); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408-409 (1917).

9. The Commission in *United Gas* granted certificates under the Natural Gas Act (15 U.S.C. 717-717w) without imposing conditions as to sales contract prices. On appeal the Commission was held to have erred in not conditioning the certificates and its order was vacated. The Commission instituted a second proceeding to determine appropriate conditions. Meanwhile, the gas was being sold under the original sales contract prices. The certificates granted in the second proceeding were conditioned to lower prices, and the Commission ordered a refund of the amounts collected in excess of these prices. The Supreme Court sustained the refund order.

as Federal authorizations, issued a fair value license. Later, the Commission, reversing itself, held that "permit" referred only to Federal authorizations, and in determining Niagara Falls' net investment, refused to use the fair value standard. The Second Circuit, through Judge Learned Hand, sustained the Commission's second interpretation of the statute. Although Section 6 of the Act expressly provides that licenses "may be altered . . . only upon mutual agreement between the licensee and the Commission . . ." (16 U.S.C. 799), the court held that the fair value license condition did not need to be followed in determining net investment.[10]

Although the court in the *Niagara Falls* case, as well as those in the *Automobile Club* and *United Gas* cases, cited above, did not find it necessary to invoke any statutory provision as the source of the agency's authority to correct mistakes, such provision exists. Section 309 of the Act (16 U.S.C. 825h) authorizes the Commission to "amend . . . and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act." The Eighth Circuit in *Northwest Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F.2d 19, 23 (8th Cir. 1950), *affirmed*, 341 U. S. 246 (1951), used this section in support of its conclusion that: "The Commission can no doubt, correct its own mistakes."[11]

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10. *Cf., Pennsylvania Water & Power Co.* v. *FPC*, 123 F. 2d 155, 162-163 (D. C. Cir. 1941), *cert. denied*, 315 U. S. 806 (1941).

11. *Cf., Public Service Commission of the State of New York* v. *FPC*, 327 F. 2d 893, 897 (D. C. Cir. 1964) (construing the parallel provision of the National Gas Act (15 U.S.C. 717o)); *Power Authority of the State of New York* v. *FPC*, 339 F. 2d 269, 274 (2d Cir. 1964).

II

The final sentence of Section 23(b) provides that when the Commission makes findings on declarations of intention that proposed construction would not affect the interests of interstate or foreign commerce, "permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." Section 4(g) of the Act (16 U.S.C. 797 (g)) authorizes the Commission "to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water resources of the Nation," and Section 309 authorizes it "to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act." The issue is whether Congress intended that the permission granted under Section 23(b) would bar the Commission from subsequently requiring licenses under Sections 4(g) and 309 when it becomes clear that the interests of interstate or foreign commerce will be affected.

The Commission and the courts have held that Congress did not have such an intent. The last of the Commission's findings on Petitioner's declarations of intention spelled out that "while there may be no basis at the time a declaration of intention is filed for requiring a license for a single development, such a development in combination with others in the watershed may later be found to affect the interests of interstate commerce and hence Federal licenses might then be required for all the developments in the headwaters."[12] 8 F.P.C. 1119. The

12. Petitioner states that after it was thus advised, it "proposed no more hydroelectric developments in the area." Its point appears to be that by proposing no more developments it could assure that it would not be required to take licenses on its constructed developments. But, of course, Petitioner is not the only entity which is entitled to propose developments and receive licenses in the Little Tennessee River basin.

Eighth Circuit came to a like conclusion in *Taum Sauk*. The court held that the evidence of record would not support a finding that the Taum Sauk development would affect downstream navigability on the Black River. *Union Electric Co.* v. *FPC*, 326 F. 2d 535 (8th Cir. 1964). Under the court's interpretation of Section 23(b) of the Act—that "interests of interstate or foreign commerce" referred only to navigation and water commerce—Union Electric would have received permission to build the development under the final sentence of the section.[13] Yet the court said (*id.* at 553):

> If in the operation of the project it later develops at any time in the future that the navigability of the Black River is impaired or threatened to be impaired, the Commission would have authority under §4(g) of the Act to issue an appropriate order, including an order to prevent further operation of the project without a license.

Thus, as construed in these decisions, the permission granted under the final sentence of 23(b) plainly does not guarantee that the declarant will not be required to take licenses. And while the Commission and the Court addressed themselves to situations in which licenses are needed because of a change of facts, their conclusions would apply equally in situations in which licenses are needed to correct a mistake of law.

The above decisions, we believe, accurately construe Congress' intent. The obvious purpose of the final sentence

13. The Supreme Court, reviewing the Eighth Circuit's decision, assumed without holding that the lower court's decision was accurate with respect to effect on downstream navigability. It then reached and, as we have noted, reversed the lower court's restrictive reading of "the interests of interstate or foreign commerce." *FPC* v. *Union Electric Co.*, 381 U. S. 90, 93-94 at note 6 (1965).

of Section 23(b) was to make lawful the construction without licenses of certain hydroelectric developments on waters over which the United States exercises control. We assume that Congress by expressly authorizing the construction of these developments also implicitly authorized their operation and maintenance. Since Petitioner's developments were lawfully built and operated, any licenses issued as a result of the present proceeding would not be made retroactively effective to the date of construction.[14] We find nothing in the language of the section or its legislative history which shows that Congress also intended to authorize their operation and maintenance once the Commission has issued orders requiring licenses in response to a change in the factual situation or for the purpose of correcting a mistake of law.[15] We are constrained by a familiar rule of statutory construction to find that a Congressional permit does not include anything which is not expressly stated or necessarily implied. "[A]ll federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included." *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 235 (1960). *Accord, Charles River Bridge* v. *Warren Bridge*, 36 U. S. (11 Pet.) 420, 545-553 (1837); *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321 (1932); *Northwest Paper Co.* v. *FPC*, 344 F. 2d 41, 51 (8th Cir. 1965). The rule applies with special force when grantees try to deprive private rights of an indefeasi-

14. On backdating see: *Central Maine Power Co.* v. *FPC*, 345 F. 2d 875 (1st Cir. 1965); *Bangor Hydro-Electric Co.* v. *FPC*, No. 6614, 1st Cir., January 13, 1966; *Public Service Company of New Hampshire*, 27 F.P.C. 830 (1962); *Niagara Mohawk Power Corp.*, Project Nos. 2318, 2320, 2330, and 2424, November 15, 1965.

15. When Section 23(b) was added to the Act in 1935 (49 Stat. 846), the final sentence was not discussed in the hearings, reports, or debates.

ble nature from a Federal grant under the commerce power. *Louisville Bridge Co.* v. *United States,* 242 U. S. 409, 417 (1917); *Bridge Co.* v. *United States,* 105 U. S. 470, 480 (1881). See generally 3 SUTHERLAND, STATUTORY CONSTRUCTION §6402 (3d ed. 1943).

Moreover, Congress' objectives in Part I of the Act (16 U.S.C. 791-823) in general, and its objectives in the 1935 amendments in particular, would not be served by a restrictive reading of the Commission's power to require licenses for constructed developments. Congress' general purpose was to delegate to a specialized, expert body authority for continuing, comprehensive planning for the Nation's hydroelectric resources. *First Iowa Hydro-Electric Cooperative* v. *FPC,* 328 U. S. 152, 180 (1946); *FPC* v. *Union Electric Co.,* 381 U. S. 90, 98-101 (1965). Toward this end, Congress acted "to centralize the authority over such resources in one Government agency." *Northwest Paper Co.* v. *FPC,* 344 F.2d 47, 51 (8th Cir. 1965); *accord,* 32 Ops. Att'y Gen. 525 (1921). It gave the agency "sweeping authority and a specific planning responsibility." *Scenic Hudson Preservation Conference* v. *FPC,* 354 F.2d 608, 613 (2d Cir. 1965). In short, the "legislation was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised . . ." *Northwest Paper Co.* v. *FPC, supra,* at 52.

Section 23(b), making mandatory the filing of declarations of intention, was added to the Act in 1935 to give the Commission more effective control of the hydroelectric industry. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 25-26 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 46-47 (1935). At the same time, Section 4(g) was adopted to confer upon the Commission investigatory and enforcement powers "designed to strengthen the power of the Commis-

sion to protect the water resources entrusted to its care." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 23 (1935).

We note, further, that the Commission, to issue an order requiring a license, need not show that the development is not presently making optimum use of the water-power resources. Section 309, by its terms, permits the Commission to require licenses simply on a showing that the developments are within jurisdictional criteria. And while Section 4(g) requires that orders issued pursuant to it be appropriate to conserve and utilize water-power resources, all licensing serves this purpose by retaining control for the future. See, for example, Sections 14 and 15 of the Act (16 U.S.C. 807, 808), providing that upon expiration of licenses the United States may take over developments or the Commission may relicense them to a new licensee.

III

Petitioner argues that requiring licenses for its developments would be a taking of property without compensation. Its contention appears to be that Section 14 of the Act (16 U.S.C. 807), relating to recapture of developments by the United States upon expiration of their licenses, can be applied only as an exercise of the United States' dominant navigation servitude, which is not involved when jurisdiction is based on *Taum Sauk*. Congress clearly intended that this section apply to all projects of this size. See Section 10(i) of the Act (16 U.S.C. 803(i)). The Supreme Court has noted that the statutory scheme of Part I has been several times reviewed and approved by the courts. *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152, 181 (1946). In any event, we must presume the constitutionality of the statutes which we administer. *Panitz* v. *District of Columbia*, 112 F. 2d 39,

41-42 (1940); *East Ohio Gas Co.*, 1 F.P.C. 586, 592 (1939); *Mississippi River Fuel Corp.*, 2 F.P.C. 170, 175 (1940).

Petitioner's final argument, reached only if its other arguments are rejected, is that since power production at its developments is scheduled by TVA under the terms of the Fontana Agreements, the developments, even though attended by Petitioner's personnel, are operated by TVA and therefore are exempted by Section 26(a) of the TVA Act from requiring licenses from the Commission (16 U.S.C. 831y-1).[16] Petitioner's parent, Alcoa, previously made this argument on parallel facts in *Aluminum Company of America*, 13 F.P.C. 14, 21-22 (1954). The Commission said in its decision in that case: "It was not the purpose of . . . Section 26(a) to take away from the Federeal Power Commission its licensing authority over non-federal projects (See p. 22 of the March 28, 1935 Hearings before the House Committee on Military Affairs, on H.R. 6793, 74th Cong., 1st Sess.)." *Id.* at 22. The Commission held that the developments were operated by Alcoa or its subsidiaries, and not by TVA, and ordered that applications for licenses be filed.[17] *Id.* at 32. We adhere in the present proceeding to the holding in *Aluminum Company.*

16. Section 26(a) of the TVA Act provides in pertinent part:

> The requirements of this section shall not be construed to be a substitute for the requirements of any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of the section.

17. Alcoa and its subsidiaries filed a petition to review the Commission's order in the District of Columbia Circuit, but the petition was later withdrawn, and the review proceeding was dismissed. The licenses, which were issued in *Tapoco, Inc.*, 14 F.P.C. 610 (1955), were accepted by the applicants.

While the petition for a declaratory order requests a hearing, it both states facts sufficient to reach a decision[18] and fails to raise any issue upon which additional evidence need be adduced. In these circumstances, a hearing would not be useful and is not necessary. As the Fourth Circuit said in *Virginia Electric and Power Co.* v. *FPC*, 351 F.2d 408, 410 (4th Cir. 1965), "due process [does not] require a hearing where, as here, no factual controversy exists and the litigant seeks merely to controvert the legal principles upon which the Commission acts, something he can readily do by exercising his statutory right of appeal to the federal courts." *Cf., FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265 (1949).

The Commission further finds:

The Nantahala Power and Light Company's Nantahala, Thorpe, Queen's Creek, Tuckasegee, Cedar Cliff, Bear Creek, and Tennessee Creek hydro-electric developments in the Little Tennessee River basin are located on headwaters of navigable waters of the United States and generate energy for an interstate power system.

The Commission orders:

The Nantahala Power and Light Company shall file applications for licenses under the Federal Power Act for the above named hydroelectric developments within ninety days of the later of (1) issuance of the instant order, or (2) if the Company files a petition to review under Section 313 of the Act (16 U.S.C. 8251), entry of a final order by the Court of Appeals sustaining the Commission's orders.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

(SEAL)

18. Section 1.7(c) of the Commission's Rules of Practice and Procedure requires that petitions for declaratory orders "include a complete statement of the facts and grounds prompting the petition . . ."

FPC Denial of Rehearing

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

Docket No. E-7261

NANTAHALA POWER AND LIGHT COMPANY

ORDER DENYING PETITION FOR REHEARING AND RECONSIDERATION

(Issued September 6, 1966)

Nantahala Power and Light Company on August 16, 1966, filed a petition for rehearing and reconsideration of the declaratory order issued on July 18, 1966, which requires that Petitioner file applications for licenses under the Federal Power Act for its Nantahala, Thorpe, Queen's Creek, Tuckasegee, Cedar Cliff, Bear Creek, and Tennessee Creek hydroelectric developments in the Little Tennessee River basin.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the above-described petition for rehearing and reconsideration of the declaratory order of July 18, 1966, present no facts or principles of law which, were not considered by the Commission when it issued the order or which, having now been reconsidered, warrant any change or modification of the order.

The Commission orders:

The above-described petition for rehearing and reconsideration of the declaratory order of July 18, 1966, is denied.

By the Commission.

(SEAL)

GORDON M. GRANT,

Acting Secretary.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:	
Automobile Club of Michigan v. *Commissioner*, 353 U.S. 180	6
Federal Power Commission v. *Union Electric Co.*, 381 U.S. 90	2, 3, 4, 5, 6
First Iowa Hydro-Electric Cooperative v. *Federal Power Commission*, 328 U.S. 152	5
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	7
Rumford Falls Power Co. v. *Federal Power Commission*, 355 F. 2d 683	8, 9
United States v. *Appalachian Power Co.*, 311 U.S. 377	8, 9
United States Constitution and statutes:	
United States Constitution, Fifth Amendment	3, 4, 7
Federal Power Act, August 26, 1935, c. 687, 49 Stat. 838, 863, 16 U.S.C. 791a, *et seq.*	2
Section 4(e), 16 U.S.C. 797(e)	4, 5
Section 3(13), 16 U.S.C. 796(13)	7
Section 4(g), 16 U.S.C. 797(g)	6
Section 6, 16 U.S.C. 799	7
Section 14, 16 U.S.C. 807	3, 7, 8
Section 23(b), 16 U.S.C. 817	2, 3, 4, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 911

NANTAHALA POWER AND LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 384 F. 2d 200. The declaratory order of the Commission (Pet. App. C., 1c–14c) is reported at 36 FPC 119. The Commission's order denying rehearing (Pet. App. C, 15c) is reported at 36 FPC 581.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1967, and the petition for certiorari was filed on December 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

287-974—68

QUESTIONS PRESENTED

1. Whether the Federal Power Commission is foreclosed from requiring petitioner to obtain licenses for the continued operation and maintenance of hydroelectric projects which generate electric power transmitted in interstate commerce by the Commission's findings, made prior to this Court's decision in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, that construction of the projects would not affect interstate commerce.

2. Whether the court below correctly held that petitioner's challenge to the constitutionality of the net-investment recapture provision of Section 14 of the Federal Power Act was not ripe for decision.

STATUTE INVOLVED

The relevant provisions of the Federal Power Act (49 Stat. 838, 863, 16 U.S.C. 791a *et seq.*) are set forth in Appendix B to the petition.

STATEMENT

Petitioner operates seven unlicensed hydroelectric projects constructed between 1941 and 1955 on nonnavigable headwaters of the Little Tennessee River in western North Carolina. The projects are interconnected with the Tennessee Valley Authority system, and some of their output is transmitted in interstate commerce. Prior to the construction of these projects, petitioner filed declarations of intention with the Commission, pursuant to Section 23(b) of the Federal Power Act (49 Stat. 838(b), 16 U.S.C. 817). The Commission approved the construction of the proj-

ects without licenses on the basis of its findings that the construction would not affect interstate commerce. At the time these findings were made, the phrase "interests of interstate or foreign commerce," as used in Section 23(b), was widely interpreted as referring only to navigation and water commerce (Pet. App. 1c–4c).

In May 1965, this Court held in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90 ("Taum Sauk"), that projects to and from which electric power flowed in interstate commerce thereby had effects on interstate commerce and were required to be licensed. Thereafter the Commission advised petitioner and others similarly affected by *Taum Sauk* that licenses might be required for their projects. Petitioner then applied to the Commission for a declaratory order that no licenses were required for its projects. Petitioner argued that the Commission's findings in its earlier orders estopped it from now requiring that the projects be licensed, and that to subject the projects to the risk of recapture by the United States at net investment, as required by Section 14 of the Act (16 U.S.C. 807), would violate the Fifth Amendment of the United States Constitution. The Commission held that licenses were required because of the projects' effects on commerce in electricity and ordered petitioner to apply for licenses [1] (Pet. App. C, 1c–14c). The court of appeals affirmed, rejecting peti-

[1] The Commission did not find it necessary to consider the constitutional question raised here, and rejected a contention (not renewed in this Court) that an operating agreement with the Tennessee Valley Authority served to exempt petitioner from licensing jurisdiction.

tioner's interpretation of the licensing requirements of the Act and holding the Fifth Amendment question not ripe for decision (Pet. App. A).

ARGUMENT

1. Petitioner does not deny that under the standards enunciated in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, its projects affect interstate commerce and therefore would normally be subject to license under Section 4(e) and 23(b) of the Federal Power Act (16 U.S.C. 797(e), 817). It contends, however, that because the Commission found, at the time the declarations of intention were filed, that the construction of the projects would not affect interstate commerce, the Commission may not subsequently require petitioner to secure licenses for the continued maintenance and operation of the projects, even though these activities clearly affect interstate commerce. The Congressional intention, petitioner argues, in requiring the Commission to determine whether proposed construction would affect interstate commerce was to encourage private investment in hydroelectric developments by providing a means whereby investors could obtain a conclusive determination whether the project would be subject to regulation by the Commission.

The court below correctly held that the result urged by petitioner is inconsistent with both the plain meaning and the objectives of the Federal Power Act. When the Commission finds that the construction of a proposed hydroelectric project would affect interstate commerce, Section 23(b) prohibits the *construction, maintenance, or operation* of the project without

a license. The last sentence of Section 23(b), relied upon by petitioner, permits only *construction* without a license when the Commission finds that the construction will not affect interstate commerce; it does not preclude the Commission from subsequently requiring a license, under Section 4(e), for the maintenance and operation of a project. The court below concluded that the Commission's original negative findings granted petitioner only the right to construct the projects and to maintain and operate them without a license, so long as such operation did not affect interstate commerce.

This Court has consistently held that the Federal Power Act was intended to secure a comprehensive development of the nation's water-power resources through effective federal regulation. *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 99–101; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180–181. Petitioner's position is, in effect, that authorization to construct a project without a license constitutes a perpetual grant of immunity from any requirement to obtain a license for operation and maintenance of the project; or, put another way, that the national interest in regulating a hydroelectric project must be determined at the time of its proposed construction and that, once a negative finding is made, it is not material whether subsequent factual developments or judicial interpretations of the statute indicate that the operation of the project affects interstate commerce.[2]

[2] It is unclear from the Petition whether Nantahala concedes, as it apparently did in the court below (Pet. App. 22a–23a),

In *Union Electric,* however, this Court found, on the basis of the Act's history, that Congress intended the Commission's regulatory powers to be coextensive with the full scope of federal authority under the commerce clause. Nothing in that history suggests that Congress intended to sacrifice the public interest in regulating the operation of a project that affects commerce in favor of protecting investors' reliance on the Commission's initial finding.[3] As the court below stated:

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that it may properly be required to obtain licenses for the operation of its projects in the event that possible future changes in the bed of the Tennessee River or in the use of riparian lands create an effect on "downstream navigability." If petitioner no longer makes this concession, its position must be that the Commission is powerless to exert any regulatory control over even the most intolerable impediment to navigation. If, on the other hand, petitioner still concedes that the Commission can require a license on the basis of changes in the underlying facts, petitioner thereby dilutes its argument that Congress meant to create an indefeasible right to be free from federal regulation on the basis of an initial negative finding by the Commission under Section 23(b). Petitioner might argue that, although the Commission can reopen the licensing question under Section 4(g) on the basis of changes in facts, it cannot do so in order to apply subsequent interpretations of the statute. It is at least a partial answer to this argument that the Commission must apply the law as it stands at the time of the proceedings and not some earlier interpretation that has been superseded. The full refutation is, of course, that the Commission is not estopped from correcting mistakes of law. See *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183.

[3] Petitioner here, as in the court below, alleges that certain early statements made by the Commission or its officers assert that an initial Commission finding that a proposed project would not affect interstate commerce confers perpetual immunity from the licensing requirements of the Act. These statements were fully reviewed by the court below (Pet. App. 6a–9a,

> Unless the inference is unambiguous and compelling, a court would not be warranted in upholding a claim that Congress meant to create an indefeasible private right springing from an initial exercise of the Commission's regulatory authority, that would survive and remain immune from further regulation under any circumstances * * * [Pet. App. 16a].

2. Section 14 of the Federal Power Act provides that at the expiration of the license period the United States may take over any project on payment of the licensee's net investment; under Section 6 of the Act (16 U.S.C. 799), this "recapture" condition must be accepted by the licensee in order to obtain a license. Petitioner contends that to require it to obtain licenses which include the recapture provision would constitute a taking of property without just compensation, in violation of the Fifth Amendment, because net investment, as defined in Section 3(13) of the Act (16 U.S.C. 796(13)), is normally lower than fair market value. The court below properly held that this question was not ripe for decision. The application of the recapture provisions to petitioner's projects can arise only in the event that Congress decides to authorize and appropriate funds for recapture, and Congress may never make this decision.

12a–13a), and it is unnecessary to repeat here its demonstration that they do not support petitioner's conclusions. In fact, one of the orders relied on by petitioner expressly stated that changed circumstances could require future licensing of petitioner's project (Pet. App. 13a–14a). And, as the court noted, even if the Commission had taken a consistent view contrary to that now adopted, this could not preclude the Commission from exercising the actual powers delegated to it by the Congress (Pet. App. 9a, n. 12; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678, n. 5).

Petitioner's licenses, moreover, would not expire for a number of years, and it is impossible to predict with any degree of certainty at this time that fair value would exceed net investment at the time recapture proceedings might be instituted.[4] If and when the United States attempts to recapture any of these projects, petitioner will not be precluded from raising its constitutional question.

Contrary to petitioner's assertion, the decision of the court below is not in conflict with *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 or *Rumford Falls Power Co.* v. *Federal Power Commission*, 355 F. 2d 683 (C.A. 1). In *Appalachian*, the United States sued to enjoin the construction of a project unless the developer secured a license or, in the alternative, to obtain an order for the removal of that part of the project which already had been constructed; the developer argued, *inter alia*, that the recapture provision of the license violated the Fifth Amendment. This Court's decision to reach the merits of the constitutional issue was based upon the exceptional circumstances of the case, and it does not

[4] The court also noted that the issue might become moot because "possible future changes in the bed of the Tennessee River, or its tributaries or the use of riparian lands, may create an effect on downstream navigability, and the developments may thereby become subject to what even Nantahala acknowledges as the government's limited right of recapture at less than fair value." (Pet. App. 22a–23a.) Indeed, this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, upheld the constitutionality of the recapture provisions of Section 14 in such context.

establish that the constitutionality of the recapture provision may always be raised at the time a license requirement is imposed. The court found that:

> [H]ere the requirements of § 14 so vitally *affect the establishment and financing* of respondent's project as to require a determination of their validity before finally adjudging the issue of injunction. [311 U.S. at 421; emphasis supplied.]

In the present case, on the other hand, petitioner's projects have been operating for more than ten years, and there is no allegation that the license conditions will jeopardize its financial position.

In *Rumford Falls,* a project owner challenged a condition in Commission's proposed license requiring the licensee to permit others to use its facilities on the grounds that the condition was ambiguous and beyond the Commission's authority. Judicial review prior to the owner's acceptance of the disputed condition was appropriate so that the owner could know what effect the condition might have on its operations and so that the Commission could clarify or revise the condition if it was held to be defective. The present case involves a condition which is not claimed to be ambiguous and which is imposed by statute and not as an exercise of the Commission's discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1967

No. 911

NANTAHALA POWER AND LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONER

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January 26, 1968

IN THE

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OCTOBER TERM, 1967

No. 911

NANTAHALA POWER AND LIGHT COMPANY,
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FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONER

Petitioner files this reply brief to correct any misconception, which might result from statements contained in the Brief of the Federal Power Commission in Opposition, as to the first issue in this case. The first question in both the Petition for Certiorari and the Brief in Opposition involves a determination of whether Congress has delegated to the Federal Power Commission under the Federal Power Act the power to revoke the Congressional permission granted by Section 23(b) of the Act. Whether Congress could revoke its permission and require licenses is not at issue here.

It is not Petitioner's position, as stated in the Brief in Opposition (page 5), that Petitioner has been granted "a perpetual grant of immunity from any requirement to obtain a license . . .". Instead, Petitioner maintains only

that the Federal Power Commission has not been given the power by Congress to require Petitioner to file for licenses under the circumstances of this case. The Court below understood the issue and Petitioner's position thereon as set forth above and its decision was properly directed to the power of the Federal Power Commission, not to the power of Congress (Petition, pp. 4a-5a).

Respectfully submitted,

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January 26, 1968